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# U.C.C. Survey: General Provisions, Bulk Transfers, and Documents of Title

David Frisch

*University of Richmond*, [dfrisch@richmond.edu](mailto:dfrisch@richmond.edu)

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# General Provisions, Sales, Bulk Transfers, and Documents of Title

By David Frisch\* and John D. Wladis\*\*

This article reviews recent case law and related developments under Articles 1, 2, 6 and 7 of the Uniform Commercial Code (U.C.C. or Code).

## STATUTE OF FRAUDS

The past year has seen continued litigation under section 2-201. More significantly, however, the National Conference of Commissioners on Uniform State Laws Article 2 Drafting Committee has tentatively decided to repeal the statute of frauds.<sup>1</sup> Consequently, the cases mentioned herein may, in the not too distant future, become irrelevant.

*Milltex Industries Corp. v. Jacquard Lace Co.*,<sup>2</sup> epitomizes the type of case that calls for repeal of the statute. The parties admittedly entered into an oral contract for the purchase and sale of "griege goods" (an unfinished textile). Pursuant to this agreement, the seller shipped and the buyer accepted 23,000 pounds of the goods. When the buyer refused to pay, the seller sued. Thereupon the buyer filed a counterclaim contending that, pursuant to the oral agreement, the seller had agreed to ship 40,000 pounds of the goods. The trial court granted

\*Mr. Frisch is a member of the Florida and Rhode Island bars and a professor of law at the Widener University School of Law.

\*\*Mr. Wladis is a member of the New York bar and an associate professor of law at the Widener University School of Law.

The following people contributed to the preparation of this article: Donald W. Garland, Gregory Gelfand, Bryan Hull, Gary Monserud, Robert E. Nies, and William R. Waddell.

1. It may not be enough simply to repeal § 2-201. It was also proposed that the revised Article 2 should specifically exempt contracts within its scope from the coverage of all non-Code statutes of frauds. As things now stand, the applicability of non-Code statutes of frauds to Article 2 cases is uncertain. In one case decided this survey period, *AP Propane, Inc. v. Superbeck*, 555 N.Y.S.2d 211, 12 U.C.C. Rep. Serv. 2d (Callaghan) 35 (N.Y. App. Div. 1990), the general statute of frauds was held to be inapplicable to requirements contracts covered by the U.C.C. *Id.* at 212-13, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 36-37. In another case, *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 14 U.C.C. Rep. Serv. 2d (Callaghan) 706 (7th Cir. 1991), the Seventh Circuit suggested that § 2-201 may not apply at all to an exclusive distributorship agreement despite the fact that because its predominant purpose was the sale of goods, it would be classified for other purposes as an Article 2 contract. *Id.* at 1184, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 714-15.

2. 557 So. 2d 1222, 12 U.C.C. Rep. Serv. 2d (Callaghan) 44 (Ala. 1990).

summary judgment for the seller on both its claim and the buyer's counterclaim. On appeal, the Alabama Supreme Court affirmed.<sup>3</sup>

The supreme court began by correctly recognizing that an oral contract can be enforced to the extent goods have been received and accepted by the buyer.<sup>4</sup> The buyer, however, argued that summary judgment was inappropriate because there was a question of fact concerning the price, contending that the agreed-upon price per pound was \$4.15, not \$4.50 per pound as was claimed by the seller. Remarkably, the court found this contention to be "untenable,"<sup>5</sup> stating that the buyer had never objected to the seller's written confirmation which reflected the higher price.<sup>6</sup> But this interpretation misses the point of the statute and confuses it with the parol evidence rule. There is a difference between compliance with the statute of frauds and the existence of a signed written agreement sufficient to preclude litigation over its terms. If the failure to respond to a confirmatory memorandum would not bar a trial on the defense of no contract, certainly the door should not be closed to disputing its terms.<sup>7</sup>

Finally, with respect to the buyer's counterclaim, the court ruled that summary judgment was proper because proof of the alleged contract was prohibited by section 2-201(1).<sup>8</sup> The court ignored the statutory exception for judicial admissions.<sup>9</sup> Because the existence of a contract was never in dispute, this seems to be an especially compelling case for giving the buyer the opportunity, through discovery or otherwise, to extract an admission of the greater quantity.<sup>10</sup> The

3. *Id.* at 1224, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 46.

4. *Id.* at 1223, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 46; see U.C.C. § 2-201(3)(c) (1991). This exception to the statute's writing requirement was also involved in *Joseph Heiting & Sons v. Jacks Bean Co.*, 463 N.W.2d 817, 13 U.C.C. Rep. Serv. 2d (Callaghan) 336 (Neb. 1990), where the Nebraska Supreme Court remanded the case to the trial court for a determination of whether the buyer had "accepted" the seller's beans by commingling them with other beans. *Id.* at 822-23, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 341-42. Additionally, the court decided that trade usage could not be a further source of exceptions to the statute. *Id.* at 822, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 341.

5. *Milltex Industries*, 557 So. 2d at 1223-24, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 46.

6. *Id.* at 1224, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 46. The court mistakenly believed that this holding was consistent with § 2-201(2). That subsection provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

U.C.C. § 2-201(2) (1991).

7. A number of cases have held correctly that a failure to respond to a confirmatory memorandum does not bar a trial on the question of whether there actually was a contract. See, e.g., *Spinnerin Yarn Co. v. Apparel Retail Corp.*, 614 F. Supp. 1174, 42 U.C.C. Rep. Serv. (Callaghan) 65 (S.D.N.Y. 1985).

8. *Milltex Industries*, 557 So. 2d at 1224, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 46.

9. See U.C.C. § 2-201(3)(b) (1991).

10. There has never been a consensus on how much latitude the party asserting a contract should have to elicit an admission from the party who is asserting the statute of frauds as a defense. The diverse views on this subject are discussed in *Triangle Mktg., Inc. v. Action Indus., Inc.*, 630 F. Supp. 1578, 1581-84, 1 U.C.C. Rep. Serv. 2d (Callaghan) 36, 40-46 (N.D. Ill. 1986).

purpose of the statute seemingly has been satisfied once the contract is admitted, and all of its terms should be fair game for proof by either party.<sup>11</sup>

The potential for the statute to foster rather than to prevent fraud often can be ameliorated by a genuinely creative court. For example, consider Judge Posner's opinion in *Monetti, S.P.A. v. Anchor Hocking Corp.*<sup>12</sup> The plaintiffs, an Italian firm and its subsidiary that made products for the food service industry, allegedly agreed to grant the defendant the exclusive right to distribute their products in the United States. In return, the defendant allegedly guaranteed that it would make specified minimum purchases, adding up to \$27 million during the term of the agreement. Shortly thereafter, the plaintiffs turned over to the defendant all of the subsidiary's inventory, records, and other physical assets, together with the subsidiary's trade secrets and know-how. Eventually, the parties' relationship deteriorated and the plaintiffs sued for breach of contract. The district judge dismissed the suit as barred by the statute of frauds.

On appeal, the Seventh Circuit reversed.<sup>13</sup> While the result of the case actually rested on the conclusion that a post-contract memorandum written by the defendant's marketing director was sufficient under section 2-201(1), the opinion touches on numerous statute of frauds issues.<sup>14</sup> Two are of particular interest. The first pertains to a memorandum that preceded the actual formation of the contract. Although section 2-201(1), interpreted literally, seems to preclude consideration of precontractual writings, the court decided that this was not what the drafters intended.<sup>15</sup> Where, as here, the memorandum prepared by the defendant indicated acceptance of most of the provisions requested by the plaintiffs, the court felt that there was no reason why it could not be used to satisfy the statute.<sup>16</sup> The second interesting aspect of the opinion is the court's willingness to recognize a "partial performance" exception to the statute.<sup>17</sup> Judge Posner was careful, however, to limit its scope to performance other than the delivery of the goods.<sup>18</sup> Here, the evidentiary weight of the plaintiffs'

11. Interestingly, there is authority this year that a writing under subsection (1) need not specify a quantity. See *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 677-78, 13 U.C.C. Rep. Serv. 2d (Callaghan) 669, 677-80 (3rd Cir. 1991). If that is true, there is no reason why a party should not be permitted to prove a quantity when an oral contract is otherwise admitted.

12. 931 F.2d 1178, 14 U.C.C. Rep. Serv. 2d (Callaghan) 706 (7th Cir. 1991).

13. *Id.* at 1186, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 718.

14. *Id.* at 1181-85, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 710-16. In an opinion consisting largely of dicta, the following are just a few of the issues discussed: (1) whether oral evidence may be admitted to show that an ambiguous writing satisfied the statute (yes), (2) whether the statute is substantive for purposes of the Erie doctrine (yes), (3) whether a letterhead satisfies the signature requirement (yes), and (4) whether promissory estoppel can be used to avoid the statute (maybe).

15. *Id.* at 1182, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 712.

16. *Id.* The court distinguished the case before it from two others where the precontractual writing would not be sufficient. In the first, the writing is merely one party's offer. In the second, the writing consists of no more than notes made in preparation for a negotiating session.

17. *Id.* at 1183, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 712.

18. *Id.* at 1184, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 715. The court's explanation for this limitation makes sense. "In such a case partial performance just is not indicative of the existence of an oral contract for any quantity greater than that already delivered . . ." *Id.*

performance was inescapable—if there had been no agreement why was the subsidiary's property transferred to the defendant? This evidence was so persuasive that most courts would stretch to find a way to give the plaintiffs their day in court.

## PAROL EVIDENCE

The New York Court of Appeals, in *Intershoe, Inc. v. Bankers Trust Company*,<sup>19</sup> issued an opinion that was as significant for what it did not say, as for what it did say. Over many years, a shoe importer (Intershoe) had entered into hundreds of transactions with Banker's Trust Co. (Bankers) for the exchange of Italian lira, for U.S. dollars. On one occasion Intershoe's treasurer negotiated a transaction by telephone. Bankers sent Intershoe a confirmation slip describing the transaction as a sale of lira by Intershoe to Bankers. Intershoe's treasurer signed the slip and returned it to Bankers. Later, after Bankers asked for delivery of the lira, Intershoe replied that it had agreed to buy, not sell, the lira. Intershoe sued Bankers for failure to deliver the lira, claiming that the confirmation slip was mistaken. Bankers counterclaimed. The trial court denied Bankers' motion for summary judgment on the main claim and its counterclaim. On appeal, a divided court affirmed.<sup>20</sup> The appellate court concluded that denial of summary judgment was proper for two reasons: First, Intershoe's claim of mistake raised a factual issue as to whether the confirmation slip constituted a "final expression" of the parties' agreement under U.C.C. Section 2-202. Second, where one party claims that by mutual mistake a writing does not reflect the actual agreement, oral evidence of the parties' actual agreement is admissible.

The New York Court of Appeals unanimously reversed and directed that summary judgment for Bankers be granted.<sup>21</sup> The court reasoned that the confirmation slip was a final expression of the parties' agreement so that Intershoe's proffered evidence, which contradicted the confirmation slip, was inadmissible under U.C.C. Section 2-202.<sup>22</sup>

The court of appeals did not address mutual mistake, the Appellate Division's second reason for admitting Intershoe's evidence. This omission is puzzling, because the mutual mistake exception to the parol evidence rule repeatedly has been recognized by the New York Court of Appeals in other cases.<sup>23</sup>

It is possible that the court of appeals interpreted U.C.C. Section 2-202 to bar the introduction of any parol evidence contradicting a writing that is a final expression of the parties' agreement. If so, this interpretation of section 2-202 almost certainly is incorrect. Under pre-Code cases, it was clear that the parol

19. 571 N.E.2d 641, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1 (N.Y. 1991).

20. *Intershoe, Inc. v. Bankers Trust Co.*, 554 N.Y.S. 2d 514 (N.Y. App. Div. 1990).

21. *Intershoe*, 571 N.E.2d at 642-43, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 2.

22. *Id.* at 644, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 4-5.

23. See, e.g., *Chimart Assoc. v. Paul*, 489 N.E.2d 231, 233-34 (N.Y. 1986); *Marine Midland Bank-Southern v. Thurlow*, 425 N.E.2d 805, 807 (N.Y. 1981).

evidence rule did not bar oral evidence of mutual mistake.<sup>24</sup> This rule continues in non-sales parol evidence cases.<sup>25</sup> Because section 2-202 does not create a specific exception for mutual mistake, it has been argued that the pre-Code mutual mistake exception has been abolished in sales cases. The counter argument is that this exception continues to be good law, either under section 1-103, or under the "final expression" requirement of section 2-202.<sup>26</sup>

Nothing in the drafting history of section 2-202 suggests that the drafters intended to abolish the mutual mistake exception. Given the wide recognition of this exception, one would have expected some indication in either text or comments if the drafters had intended to abolish it. What evidence there is indicates otherwise. In 1954, the New York State Law Revision Commission suggested that a sentence be added to section 2-202 saving the law of reformation. The Article 2 Subcommittee of the Editorial Board rejected the suggested addition as unnecessary, because nothing in the section dealt with reformation.<sup>27</sup> This is tantamount to a statement that nothing in the section deals with mutual mistake because mutual mistake is the chief ground for reformation.<sup>28</sup>

The *Intershoe* court, no doubt, was concerned about the ease with which a commercial entity could sign a contract and then avoid summary judgment by alleging a mistake in expression. One solution to this problem is to treat all such allegations as equitable claims for reformation or rescission. Indeed, *Intershoe* was, in effect, seeking reformation of the confirmation slip. Treating the claim of mistake in expression as an equity matter will result in appropriate weight being given to a writing while not completely foreclosing a litigant's ability to show a mistake in expression. This is true for several reasons. First, the court decides the mistake issue.<sup>29</sup> Second, mistake in expression must be proved by "clear and convincing" evidence.<sup>30</sup> Finally, gross negligence, as where one signs a written contract perfectly clear in its terms without reading it, can preclude a reformation claim.<sup>31</sup>

24. See, e.g., Restatement of Contracts § 238(b), (c) (1932); Charles T. McCormick, Handbook of the Law of Evidence 450, n.7 (1954).

25. See, e.g., Restatement (Second) Contracts § 214(d) (1981); *Id.* § 155, cmt. a; see also *supra* note 23 (for examples of New York Court of Appeals cases cited).

26. See James White & Robert S. Summers, Uniform Commercial Code § 2-11 (3d student ed. 1988); William Hawland, Uniform Commercial Code Series § 2-202:02 at 45 (1984).

27. Comment on Criticisms of Article 2 Uniform Commercial Code at 16 (Oct. 31, 1955) in the Robert Braucher Papers, at the Harvard Law School Library, File 26-2 ("The new sentence is unnecessary; nothing in the section deals with reformation.").

28. E.g. Henry L. McClintock, Handbook of the Principles of Equity 256-83 (2d ed. 1948).

29. Equitable defenses, even if asserted in legal actions, generally are decided by the court. See, e.g., Fleming James and Geoffrey Hazard, Civil Procedure § 8.8 (3d ed. 1985). This is also the rule in New York: See N.Y. Civ. Prac. L. & R. 4101 (McKinney 1963 and Supp. 1991).

30. See generally George E. Palmer, *Reformation and the Parol Evidence Rule*, 65 Mich. L. Rev. 833 (1967). For New York cases, see 16 N.Y. Jur. 2d, Cancellation and Reformation of Instruments § 60 (1982 & Supp. 1991).

31. *Schneider v. Swartele*, 267 N.Y.S. 714, *aff'd*, 8 N.E.2d 336 (1933); see generally 16 N.Y. Jur. 2d, Cancellation and Reformation of Instruments § 50 (1982 & Supp. 1991).

In *Gordon v. Northwest Auto Auction, Inc.*,<sup>32</sup> the North Carolina Supreme Court ruled that evidence of trade usage was inadmissible to explain clear and unambiguous language in a contract. The rule applied in this case is in direct conflict with the drafters' intent as expressed in Comment 1(c) to section 2-202.<sup>33</sup> The court should have relied on section 1-205.<sup>34</sup> It could have kept the testimony out, either on the theory that it did not constitute trade usage,<sup>35</sup> or on the theory that express terms control trade usage when one is not reasonably consistent with the other.<sup>36</sup>

## BATTLE OF THE FORMS

Suppose a buyer is aware of a boilerplate term and objects to it. The seller then refuses to change the term, and the buyer continues to order goods from the seller. Is the buyer stuck with the term? He is, ruled the U.S. Circuit Court of Appeals for the Seventh Circuit in *Advance Concrete Forms, Inc. v. McCann Construction Specialties Co.*<sup>37</sup> There, the buyer was a distributor of the seller's products and ordered goods on numerous occasions. Each of the seller's invoices contained an 18% per annum finance charge clause. The buyer was aware of this clause and claimed it had objected to it. Nevertheless, the buyer continued to order goods from the seller. Eventually the business relationship soured, and the seller sued to recover the unpaid balance together with the 18% finance charge. Both the district court and the Seventh Circuit held the buyer liable for the finance charge. The district court characterized the buyer's actions in objecting to the clause but continuing to order goods as a "grumbling acceptance." The Seventh Circuit, citing Comment 5 to U.C.C. Section 2-207, found the clause not to be a material alteration.<sup>38</sup> It also found that the buyer had waived its objection to the term by continuing to purchase goods on credit with knowledge of the clause.<sup>39</sup>

Not all courts agree with this approach. For example, in the 1986 case of *Diamond Fruit Growers, Inc. v. Krack Corp.*,<sup>40</sup> the Ninth Circuit Court of Appeals held that a buyer who had unsuccessfully objected to a limitation of

32. 400 S.E.2d 37, 13 U.C.C. Rep. Serv. 2d (Callaghan) 994 (N.C. 1991) (per curiam), *rev'g* 387 S.E.2d 227, 11 U.C.C. Rep. Serv. 2d (Callaghan) 10 (N.C. Ct. App. 1990).

33. Section 2-202, Comment 1 provides, in pertinent part: "This section definitely rejects: . . . (c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) [e.g. usage of trade] is an original determination by the court that the language used is ambiguous." U.C.C. § 2-202 cmt. 1 (1991).

34. U.C.C. § 1-205 specifically addresses course of dealing and trade usage.

35. U.C.C. § 1-205(2) (1991).

36. U.C.C. § 1-205(4) (1991).

37. 916 F.2d 412, 12 U.C.C. Rep. Serv. 2d (Callaghan) 1047 (7th Cir. 1990) (applying Wisconsin law).

38. *Advance Concrete Forms, Inc.*, 916 F.2d at 416, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 1053.

39. *Id.*

40. 794 F.2d 1440, 1 U.C.C. Rep. Serv. 2d (Callaghan) 1073 (9th Cir. 1986) (applying Oregon law).

liability clause in the seller's form, but nevertheless continued to order goods from that seller, was not bound by that clause. This interpretation almost certainly was not intended by the drafters of section 2-207. That section was drafted in part to regulate the "battle of the forms"—the circumstance when buyer and seller exchange forms which match each other on dickered terms, such as quantity and price, but conflict on the pre-printed, boilerplate terms.<sup>41</sup> Nevertheless, both parties proceed to perform without discussing the differences between the forms. Because neither side has called its terms to the other's attention, neither side has a superior claim to having its terms included in the contract. The fairest result is to form the contract on the terms jointly agreed to, plus other terms supplied from neutral sources, such as trade usage, or Article 2. This is what section 2-207(3) does.

When, however, the parties have discussed a term and failed to agree, a buyer who is aware that the seller is insisting on a particular term, and who then orders goods from that seller, should be bound by that term. The drafting history of Article 2 does not support the view that the drafters intended section 2-207(3) to apply beyond the battle of the forms situation described in the previous paragraph. The history of section 2-207(3) argues against a rule as radical as that of *Diamond Fruit*.<sup>42</sup> Furthermore, the drafting history of Article 2 indicates that terms called to the other side's attention cannot be ignored. Thus, for example, under U.C.C. Section 2-207(1), a different *dickered* term prevents a response from operating as a definite expression of acceptance, but not a different *boilerplate* term.<sup>43</sup> And under U.C.C. Section 2-206(1)(b) a dickered term ordering certain goods cannot be ignored by shipping other

41. See Llewellyn's and other's descriptions in Minutes, Pennsylvania Legislative Sub-committee Meeting at 64-66 (June 21, 1952), reprinted in *The Karl N. Llewellyn Papers, Section J: The Uniform Commercial Code*, File J-(XIV)(1)(j) (Wm. S. Hein & Co., Inc., Microfilm, 1987) [hereinafter *The Llewellyn Papers*]; A.L.I., Transcript of Proceedings at the Annual Meeting of the A.L.I. in Joint Session with the N.C.C.U.S.L. 27-28 (May 1951) in *The Llewellyn Papers, supra*, File J-(XIII)(1)(d).

42. U.C.C. Supplement No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code, § 2-207(5) [hereinafter Supp. No. 1], reprinted in 17 A.L.I. & N.C.C.U.S.L., *Uniform Commercial Code Drafts 324-25* (1984) [hereinafter U.C.C. Drafts]. The Supp. No. 1 version of § 2-207 resulted from a meeting with the Commercial Code Committee of the Pennsylvania State Chamber of Commerce in December 1954. That meeting was held to answer objections raised to Article 2 raised by that organization. The present text of § 2-207 was proposed by the Pennsylvania State Chamber of Commerce Commercial Code Committee as an alternative to the Supp. No. 1 draft. The Pennsylvania Committee was composed primarily of corporate attorneys. It is unlikely that a committee so composed would have favored the radical restructuring of offer and acceptance rules adopted in *Diamond Fruit*.

43. Cf. U.C.C. § 2-207 cmt. 1. Comment 1 gives two examples: 1) non-form letter or wire that adds minor suggestions or proposals; (2) exchange of forms often with terms different from each other. Note the absence of reference to different terms in the example describing non-form acceptance. *Id.* Compare Supp. No. 1, *supra* note 42, § 2-207(1) (non-form offer: definite and seasonable expression of acceptance with additional terms operates as an acceptance) with *id.* § 2-207(4) (offer with form clauses; definite and seasonable expression of acceptance with additional or different terms operates as an acceptance).



goods.<sup>44</sup> Lastly, the *Diamond Fruit* view is inconsistent with the approach endorsed in other sections of Article 2, that the way to make an unusual term enforceable, is to call it to the other side's attention.<sup>45</sup> }

The fact that section 2-207(3) was intended to abolish the so-called "last shot" rule does not support the *Diamond Fruit* result. The last shot rule was essentially an application of common law contract doctrine that retention of benefits accompanying an offer constitutes acceptance of the terms of that offer.<sup>46</sup> This rule is fair when the offeree is aware of the offer's terms. It begins to be unfair when the offeree is not reasonably aware of the terms. This is the case when the crucial terms are in boilerplate language, because the boilerplate language usually is not read. Thus, it is unfair to apply the rule of acceptance by retention of offered benefits to the battle of the forms. Section 2-207(3) abrogates that rule to eliminate this unfairness.

When the buyer is aware of the term and orders the goods, however, it is not unfair to hold him to that term. He is aware of the term and that the goods are offered subject to that term; therefore he should be bound by the term. Indeed, the *Diamond Fruit* rule can produce patently unjust results. Suppose the buyer is displeased with the seller's asking price or credit terms. Under *Diamond Fruit*, the buyer can order the goods and, barring its specific and unequivocal assent, not be bound to the seller's price or credit terms. This outcome makes no sense, nor is there any support for it in the drafting history of Article 2.<sup>47</sup> Other cases are not in agreement with the *Diamond Fruit* rule.<sup>48</sup> Commentators have criticized it.<sup>49</sup> The *Diamond Fruit* rule should be abandoned.

44. Unless the seller notifies the buyer that it is shipping nonconforming goods as an accommodation to the buyer, the seller will be deemed to have both accepted the offer and breached it by shipping goods that do not conform to the offer. See U.C.C. § 2-206 cmt. 4.

45. See U.C.C. §§ 2-205, 2-209(2), 2-316(2), (3). See also U.C.C. § 2-504 cmt. 5 ("To have this vital and irreparable effect upon the seller's duties, such a term should be part of the 'dickered' terms written in any 'form', or should otherwise be called seasonably and sharply to the seller's attention."); General Comment on Part II: Formation and Construction 13-14, 21-23 (1948) in *The Llewellyn Papers*, *supra* note 41, File J-(X)(2)(e) (same).

46. 1 Arthur Corbin, *Contracts* § 75, text at n.39 (1962).

47. See *supra* note 42.

48. See, e.g., *Northern States Power Co. v. International Tel. & Telegraph Corp.*, 550 F. Supp. 108, 112, 35 U.C.C. Rep. Serv. (Callaghan) 1124, 1127-28 (D. Minn. 1982) (applying Minn. law); *McKenzie v. Alla-Ohio Coals, Inc.*, 29 U.C.C. Rep. Serv. (Callaghan) 852, 855 (D.D.C. 1979); *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 267, 274-75, 37 U.C.C. Rep. Serv. (Callaghan) 75, 83-85, (Ariz. Ct. App. 1983), *approved* 694 P.2d 198, 40 U.C.C. Rep. Serv. 2d (Callaghan) 418 (Ariz. 1984). Cf. *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336, 16 U.C.C. Rep. Serv. 2d (Callaghan) 46, 50-51 (7th Cir. 1991); see also *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926-27, 26 U.C.C. Rep. Serv. (Callaghan) 638, 640-43 (9th Cir. 1979) (applying Idaho law) (buyer who had "discussed" boilerplate remedy limitation provisions with the seller was held to be bound by those provisions).

49. See, e.g., John E. Murray, *The Chaos of the Battle of the Forms: Solutions*, 39 Vand. L. Rev. 1307, 1330-43 (1986); David Frisch et al., *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers and Documents of Title*, 42 Bus. Law. 1213, 1228-34 (1987).

Does the expressly conditional proviso of section 2-207(1) apply to a written confirmation of a prior informal agreement? *Air Master Sales Co. v. Northbridge Park Co-op, Inc.*,<sup>50</sup> decided by the U.S. District Court for the District of New Jersey, presents a muddled analysis of this issue. Northbridge Park Co-op (Co-op) decided to replace some 2400 windows in its apartment building. After discussions with Tri-State, a window installer (Installer) and Air Master, a window manufacturer (Manufacturer), Co-op signed a contract with Installer for it to provide and install the windows. Installer then contracted with Manufacturer to custom-make the windows, which the Manufacturer did. Shortly after Installer commenced installation, Co-op terminated its agreement with Installer because it was not satisfied with Installer's work. Co-op then negotiated directly with Manufacturer for the windows, resulting in a letter from Co-op to manufacturer confirming the negotiations. The letter recited price and a few other details and asked Manufacturer to sign and return a copy of the letter to indicate Manufacturer's "affirmance" of these terms. Manufacturer signed the letter after adding the clause "This confirmation will be valid only when [Manufacturer] receives a Purchase Order from the [Co-op] for the windows."<sup>51</sup> Manufacturer then returned this letter together with a cover letter requesting that arrangements be made as soon as possible for delivery of the windows to the job site. Later Co-op decided not to take the windows and did not issue a purchase order. Manufacturer sued Co-op on various theories, including breach of a contract for the windows, which Manufacturer claimed had resulted from its negotiations with Co-op. The court granted summary judgment for Co-op.<sup>52</sup> On the breach of contract claim the court concluded that no contract had been formed under section 2-207.<sup>53</sup> It reasoned that the clause added by Manufacturer rendered its acceptance "expressly conditional" under section 2-207(1).<sup>54</sup> Since that acceptance never became effective, no contract was formed.<sup>55</sup>

One of the points in dispute was whether the negotiations preceding Co-op's letter had resulted in an agreement.<sup>56</sup> What the court did not address was whether the "expressly conditional" proviso of section 2-207(1) had any application to a written confirmation of a prior informal agreement. It is clear from the text and comments to,<sup>57</sup> as well as the drafting history<sup>58</sup> of section 2-207(1)

50. 748 F. Supp. 1110, 13 U.C.C. Rep. Serv. 2d (Callaghan) 726 (D.N.J. 1990) (applying New Jersey law).

51. *Id.* at 1113, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 728. Air Master claimed that it had added the clause only because its internal procedures required receipt of a purchase order to input the order into its bookkeeping system. *Id.* at 1114.

52. *Air Master Sales*, 748 F. Supp. at 1111, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 726.

53. *Id.* at 1116-17, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 729-31.

54. *Id.*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 730.

55. *Id.*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 731.

56. *Id.* at 1116; 13 U.C.C. Rep. Serv. 2d (Callaghan) at 729.

57. U.C.C. § 2-207 cmt. 2 provides in pertinent part: "[T]herefore any additional matter contained in the *confirmation* or in the *acceptance* falls within subsection (2) and must be regarded as a proposal for an added term unless the *acceptance* is made conditional on the acceptance of the

that the expressly conditional proviso does not apply to a written confirmation. Caselaw agrees.<sup>59</sup> If an agreement had been reached in *Air Master* before the exchange of letters, then Manufacturer's confirmation, even if it were expressly conditional, would not upset that agreement. The question of whether the parties reached an agreement is a material question of fact which should have prevented summary judgment.

## WARRANTY OF TITLE

Does an auctioneer of goods impliedly warrant title under U.C.C. Section 2-312? In *Jones v. Ballard*,<sup>60</sup> the Mississippi Supreme Court held that if the auctioneer does not disclose the principal for whom it is selling, the auctioneer is deemed to be the seller and thus warrants title. If the auctioneer, however, does disclose its principal when it sells, the principal, not the auctioneer, is the seller and warrants title under section 2-312.<sup>61</sup>

The drafting history makes clear that auctioneers are not automatically protected by subsection 2-312(2) on the theory that the circumstances give the buyer reason to know that the auctioneer is not claiming title in itself.<sup>62</sup>

additional or different terms." (emphasis added). Note that this excerpt refers to both "the confirmation" and "the acceptance" when describing the type of response, but refers only to "the acceptance" when discussing the expressly conditional proviso. The grammatical structure of § 2-207(1) is such that the term "the acceptance" in the proviso could refer either to "expression of acceptance" (a factual description which is distinct from a "confirmation") or to "operates as an acceptance" (a legal conclusion which includes both "expression of acceptance" and "confirmation.") Comment 2 indicates that the term "the acceptance" in the expressly conditional proviso was intended to refer to "expression of acceptance."

58. Cf. Comment on § 29 [2-10] additional Terms in Acceptance of confirmation, at 1 (1948), reprinted in *The Llewellyn Papers*, *supra* note 41, ("If the deal has in fact been closed, this Act recognizes it as a contract and any additional matter contained either in the acceptance which closed the deal or in a later confirmation falls within paragraph (a) [now 2-207(1)] and must be regarded as a proposal for an added term or modification which in no way upsets the original deal.") (emphasis added); Supp. No. 1, *supra* note 42, § 2-207(1), (2) & (3) (Jan. 1955), reprinted in 17 U.C.C. Drafts 324 (Expressly conditional proviso is contained in subsections (2) and (3) dealing with expressions of acceptance, but not in subsection (1) dealing with confirmations).

59. For cases, see James White and Robert S. Summers, Uniform Commercial Code, §§ 1-3, at 45 n.60 (3d student ed. 1988).

60. 573 So. 2d 783, 14 U.C.C. Rep. Serv. 2d (Callaghan) 731, (Miss. 1990).

61. See 80 A.L.R. 2d 1237 (1961) (cases are collected in Annotation *Liability of Auctioneer or Clerk To Buyer as to the Condition, or Quantity of Property Sold*).

62. Uniform Sales Act § 13(4) explicitly protected auctioneers from the implied warranty of title. Accord Second Draft of A Revised Uniform Sales Act § 13(2) (Dec. 1941), reprinted in 1 U.C.C. Drafts, *supra* note 42 at 386-87. In the Revised Uniform Sales Act, Third Draft § 36(2) (1943) in the A.L.I. Archives, Drawer 202, the specific references to auctioneers and others has been replaced with general language very similar to what is now U.C.C. § 2-316(2). See N.C.C.U.S.L., Consideration in Committee of the Whole of the Revised Uniform Sales Act at 95 (Aug. 17-21, 1943) in the Llewellyn Papers, *supra* note 41, File J-(V)(2)(h). Cf. U.C.C. § 2-316, cmt. 5 which does not list auctioneers among those who are covered by § 2-316(2).

## IMPLIED WARRANTY OF MERCHANTABILITY

In *Osborn v. Custom Truck Sales & Service*,<sup>63</sup> the Alabama Supreme Court held that there is no implied warranty of merchantability in the sale of used motor vehicles by a merchant seller. The recognition of an implied warranty of merchantability in the sale of used goods can produce difficult questions of fact. Some defects are to be anticipated in used goods, though the extent of such defects may well be unknown at the time of sale. Thus, some jurisdictions have held that there is no implied warranty of merchantability in the sale of used goods.<sup>64</sup> The drafters of Article 2 were cognizant of these concerns;<sup>65</sup> however, instead of ruling out such a warranty, they opted to allow the implied merchantability warranty for used goods in appropriate circumstances.<sup>66</sup>

Trademark owners sometimes license the trademark for use by manufacturers. Franchisors often license franchisees to manufacture and sell products bearing the franchisor's name. The circumstances in which the trademark owner or franchisor can be liable for breach of warranty for goods manufactured under such a trademark licensing or franchise agreement were discussed by the Connecticut Supreme Court in *Burkert v. Petrol Plus of Naugatuck, Inc.*<sup>67</sup> Courts usually decline to find liability on the basis of Article 2 warranties, since the trademark licensor or franchisor is not a "seller."<sup>68</sup> Several courts, however, have found a franchisor or trademark licensor liable on other theories. Noting that Article 2 was not intended to disturb case-law development of warranty law,<sup>69</sup> these courts find liability on common law theory<sup>70</sup> or on strict tort liability theory.<sup>71</sup> In *Burkert*, the trademark licensor was held not liable because it had no significant control over the manufacture or marketing of the

63. 562 So.2d 243, 12 U.C.C. Rep. Serv. 2d (Callaghan) 664 (Ala. 1990).

64. See Editors' Note to *Trax, Inc. v. Tidmore*, 19 U.C.C. Rep. Serv. (Callaghan) 92-93 (Ala. 1976).

65. Second Draft of a Revised Uniform Sales Act, Comment on Section 15, at 114 (Dec. 1941), reprinted in 1 U.C.C. Drafts, *supra* note 42, at 394 ("[T]he cases have shown a very healthy caution in finding any kind of reliance or of merchantability-warranty in second-hand sales. The subsection would not affect these, in any ordinary circumstances").

66. U.C.C. § 2-314, cmt. 3 ("A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their description.") A longer, prior draft of this comment was clearer on the intent to impose an implied warranty of merchantability in the sale of used goods. See Comment on Section 38 [3-13]. Implied Warranty of Merchantability at 4 (1948), reprinted in *The Llewellyn Papers*, *supra* note 41, File J-(X)(2)(e).

67. 579 A.2d 26, 13 U.C.C. Rep. Serv. 2d (Callaghan) 85 (Conn. 1990).

68. See, e.g., *id.* at 35, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 91.

69. See U.C.C. § 2-313 cmt. 2.

70. See, e.g., *Kosters v. Seven-Up Co.*, 595 F.2d 347, 351-53 (6th Cir. 1979) (applying Michigan law) (consumer injured by exploding bottle; suit against franchisor); *Harris v. Aluminum Co. of Am.*, 550 F. Supp. 1024, 1027-28, 35 U.C.C. Rep. Serv. 2d (Callaghan) 397, 400-02 (W.D. Va. 1982) (applying Virginia law) (consumer injured by defective bottle cap; suit against franchisor).

71. See cases cited in *Kosters*, 595 F.2d at 352, n.11.

product, and did not receive royalties or other financial benefits from the licensing program.<sup>72</sup>

The form of a transaction often can have unintended consequences. In *Merritt Logan, Inc. v. Fleming Companies, Inc. (In re Merritt Logan, Inc.)*,<sup>73</sup> a payment guarantee was structured as a sale of goods to the guarantor who immediately resold to the debtor. The Third Circuit Court of Appeals held the guarantor liable as a seller for breach of warranty to the debtor when the goods malfunctioned.<sup>74</sup> The guarantor could have avoided warranty liability either by disclaiming warranties under U.C.C. Section 2-316 or by structuring the deal as a direct sale from the manufacturer to the debtor, with the guarantor guaranteeing the debtor's payment.

## DISCLAIMER OF WARRANTIES

In *Cate v. Dover Corp.*<sup>75</sup> the Texas Supreme Court held that an inconspicuous written disclaimer of the implied warranty of merchantability was effective if the buyer had actual knowledge of the disclaimer.<sup>76</sup> The buyer in that case was not a consumer. The court reasoned that, because the purpose of the conspicuousness requirement contained in section 2-316(2) is to protect the buyer from surprise and an unknowing waiver of its rights, the buyer's actual knowledge satisfied that purpose and made the disclaimer effective.<sup>77</sup> The court also ruled the seller had the burden of proving that the buyer had knowledge of the disclaimer.<sup>78</sup>

This result is consistent with both the drafting history<sup>79</sup> and Official Comments to section 2-316.<sup>80</sup> Nevertheless, a substantial body of case law has

72. *Burkert*, 579 A.2d at 35, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 91.

73. 901 F.2d 349, 12 U.C.C. Rep. Serv. 2d (Callaghan) 421 (3d Cir. 1990).

74. *Id.* at 358-59, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 432-33.

75. 790 S.W.2d 559, 12 U.C.C. Rep. Serv. 2d (Callaghan) 47 (Tex. 1990).

76. *Id.* at 562, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 54.

77. *Id.* at 561, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 53. For a discussion of this issue, see Barkley Clark & Christopher Smith, *The Law of Product Warranties*, ¶ 8.03[2] at 8-16 to -17 (1984).

78. *Cate*, 790 S.W.2d at 562, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 53.

79. The twin requirements of conspicuousness and mention of merchantability contained in § 2-316(2) were added in 1955 by Supp. No. 1, *supra* note 42, *reprinted* in 17 U.C.C. Drafts 327. Before that addition, the only requirement for an effective disclaimer of implied warranties was that the disclaimer be in "specific language" coupled with the statement that if such language created "an ambiguity in the contract as a whole it shall be resolved against the seller." See Uniform Commercial Code: Official Draft, Text and Comments Edition § 2-316(2) (1952), *reprinted* in 14 U.C.C. Drafts *supra* note 42, 142-43. The Pennsylvania State Chamber of Commerce's Article 2 subcommittee objected to the "specific language" requirement. It believed that this requirement "might require an untold number of paragraphs." It suggested substituting a "general language" requirement. See Letter of Joseph J. Kelley, Jr. to William A. Schnader dated Nov. 5, 1954 at 2 and Enclosure 4 at 1, in the A.L.I. Archives, Box 66, File: Comments on Code from Various Sources. As a result of a meeting with the Pennsylvania State Chamber of Commerce Commercial Code Committee, § 2-316(2) was redrafted as it appears in Supp. No. 1, *supra*.

80. U.C.C. § 2-316 cmt. 1, 6.

developed, primarily where the buyer is a consumer, that treats the dual requirements of conspicuousness and mention of merchantability as formal requirements. Under this view, failure to satisfy those requirements invalidates any disclaimer, regardless of whether the buyer knew of and understood the disclaimer.<sup>81</sup> The Permanent Editorial Board's Article 2 Study Group initially sided with the view that knowledge of an inconspicuous disclaimer makes the disclaimer effective.<sup>82</sup> The Study Group then reversed its recommendation and adopted the "formal" view.<sup>83</sup> The view that the Article 2 Drafting Committee will adopt is not yet known.

## **TITLE, CREDITORS, AND GOOD FAITH PURCHASERS**

More cases involving the applicability of section 2-326 seem to arise from its coverage of true consignments than from any other cause.<sup>84</sup> In *In re Zwagerman*,<sup>85</sup> the debtors owned and operated a farm at which they engaged in a practice known as "custom feeding." One of their customers, the Red River Company, would furnish cattle for fattening. When the cattle weighed approximately 1100 pounds the debtors would sell them as Red River's agent at an agreed price. Upon sale, the proceeds were to be delivered to Red River and the debtors would be paid for the weight gained by the cattle after delivery. On these facts, the bankruptcy court concluded that because Red River's cattle were not delivered to the debtors "for sale" as required by section 2-326, they neither became part of the bankruptcy estate nor subject to the claim of the debtors' secured creditor.<sup>86</sup> On appeal, the district court affirmed, stating that the "primary purpose of the contract was for fattening because the available feed was better in Michigan. The sale of the cattle was incidental to the fattening contract."<sup>87</sup> The court may have erred in making this statement. There is nothing in the statute to suggest a primary purpose analysis. While this interpretation of section 2-326(3) favors the true owner, it ignores the ostensible ownership concerns on which the section rests.<sup>88</sup>

81. See Clark & Smith, *supra* note 77, ¶ 8.03[2].

82. See Preliminary Report, Article 2 Study Group: March 1, 1990, Rec. A2.3(13)(B), reprinted in A.B.A. Task Force, "An Appraisal of the March 1, 1990, Preliminary Report of the U.C.C. Article 2 Study Group," 16 Del. J. Corp. L. 981, 1107 (1991).

83. See P.E.B. Study Group, *Uniform Commercial Code, Article 2 Executive Summary*, 46 Bus. Law. 1869, 1879-80 (1991).

84. Goods "held on sale or return" are subject to the claims of the buyer's creditors while in the buyer's possession. U.C.C. § 2-326(2). Even though the goods are delivered "'on consignment' or 'on memorandum,'" *id.* § 2-326(3), they will be deemed to be on "sale or return" if (1) the goods are delivered for sale; (2) the person maintains a place of business at which he deals in goods of that kind; and (3) the person deals under a name other than the name of the person making delivery. *Id.*

85. 125 B.R. 486, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1062 (Bankr. W.D. Mich. 1991).

86. *In re Zwagerman*, 125 B.R. at 489, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1064.

87. *Id.* at 492, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1068-69. It should be noted that the court viewed the bankruptcy court's conclusion as one of fact which could only be reversed if clearly erroneous. *Id.* at 489, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1064.

88. Whether this reading of the statute is faulty as a matter of policy will depend on the extent to which creditors, in fact, rely on their debtor's possession of specific assets. For an interesting

One other case involving section 2-326(3) decided this survey period seems inconsistent with *Zwagerman*. In *In re Miller*,<sup>89</sup> the debtor did business as a seed company. In addition to buying, processing and selling seed on a wholesale distribution basis, the debtor would clean, bag, and store seed for farmers. Typically there was no agreement that the debtor would sell or purchase the farmers' seed. There was an understanding, however, that most of the seed would eventually be sold when the market price reached an acceptable level. The fact that the debtor was not given explicit authority to sell the seed did not faze the district court; it focused instead on the fact that a sale ultimately would occur.<sup>90</sup> Consequently, section 2-326(3) was applicable and the seed was subject to the security interests of the debtor's secured creditors.<sup>91</sup> It also might have been argued that because the farmers' seed had been commingled with seed belonging to the debtor, the security interests attached to the entire mass pursuant to section 9-315.<sup>92</sup>

Two cases involving the applicability of section 2-403 also were litigated this year. In *Sears Consumer Financial Corp. v. Thunderbird Products*,<sup>93</sup> the court held that the entrustment of collateral by a secured party was subject to the rights of buyers in the ordinary course under section 2-403(2).<sup>94</sup> In *Chicago Limousine Service, Inc. v. Hartigan Cadillac, Inc.*,<sup>95</sup> the Illinois Supreme Court had little difficulty in finding that a mutually rescinded sale of vehicles was not a "transaction of purchase" under section 2-403(1).<sup>96</sup> Thus, the seller—whose checks representing a return of the purchase price had bounced—never acquired

discussion of creditor reliance, see Charles W. Mooney, *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 Ala. L. Rev. 683 (1988).

89. 119 B.R. 660, 13 U.C.C. Rep. Serv. 2d (Callaghan) 1039 (Bankr. W.D. Ark. 1990). In *Zwagerman*, the court's characterization of the issue as one of fact allowed it to brush this case aside as one in which a different factual finding was made. 125 B.R. at 491, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1067.

90. *Id.* at 667, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 1049. The court relied on the official comment to the section which explains that "subsection (3) was meant to resolve 'all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer'." *Id.*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 1049 (quoting U.C.C. § 2-326 cmt. 2). In contrast, the *Zwagerman* court had this to say about that same comment: "a liberal interpretation does not include the rewriting of unambiguous phrases." 125 B.R. at 490, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1066.

91. *In re Miller*, 119 B.R. at 667, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 1049.

92. See generally David Frisch, *U.C.C. Section 9-315: A Historical and Modern Perspective*, 70 Minn. L. Rev. 1, 14-21 (1985) (U.C.C. designed to minimize pre-Code risk of secured parties losing priority when goods become commingled).

93. 802 P.2d 1035, 12 U.C.C. Rep. Serv. 2d (Callaghan) 675 (Ariz. Ct. App. 1990).

94. There is a split of authority on this issue. See Note, *Entrustment Under U.C.C. Section 2-403 and Its Implications for Article 9*, 9 Campbell L. Rev. 407 (1987).

95. 564 N.E.2d 797, 13 U.C.C. Rep. Serv. 2d (Callaghan) 306 (Ill. 1990).

96. The court theorized that "[a] completed rescission in this case would not have been a 'purchase', as that term is used in the U.C.C., because it would not have 'created' a property interest in [the seller]. Rather, it would have 'annulled' an interest in [the buyer]." *Id.*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 314.

an interest in the vehicles sufficient to allow its lender's security interest to reattach.<sup>97</sup>

## TENDER, CURE, AND NOTICE

A controversy over the constitutionality of the Code's "vouching in" provision<sup>98</sup> has been waiting to boil over for years. When section 2-607(5)(a) was first drafted, there was little doubt that a wholesaler or manufacturer could be sued in the place where his component or product caused an injury.<sup>99</sup> Beginning in 1980 with *World Wide Volkswagen v. Woodson*,<sup>100</sup> and most recently in *Asahi Metal Industries, Ltd. v. Superior Court*,<sup>101</sup> the U.S. Supreme Court has taken the inexplicable position that the involvement of a middleman breaks the minimum contacts chain for personal jurisdiction. Thus asserting jurisdiction—the power to bind the wholesaler or manufacturer by the result of litigation brought by the end user against its seller—under the vouching in concept may be a denial of the due process rights of the wholesaler or manufacturer.

The recent case of *Step-Save Data Systems, Inc. v. Wyse Technology*<sup>102</sup> raised this jurisdictional problem in an odd procedural posture, and the Third Circuit left the answer more ambiguous than it had been before the court addressed it. A commercial computer vendor (Step-Saver) from Pennsylvania sold computers in Pennsylvania, New York, and New Jersey. Step-Saver's suppliers were from Georgia and California. Serious problems with the computers arose, and Step-Saver's customers sued it in some twelve cases in Pennsylvania, New York, and New Jersey. Step-Saver gave written notice to the suppliers as required by the Code and began third party actions against these same suppliers to obtain binding effect for the vouching in. The New York court dismissed the third party claim for lack of personal jurisdiction.<sup>103</sup>

97. *Id.*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 313-15. If the court had determined that the rescission of the sales contract constituted a repurchase of the vehicles by the seller, the substance of the case would have been no different from that of *In re Samuels & Co.*, 510 F.2d 139 (5th Cir. 1975), *rev'd on rehearing en banc*, 526 F.2d 1238 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976).

98. U.C.C. § 2-607(5)(a) (1991).

99. *See, e.g.*, *Hess v. Pawloski*, 274 U.S. 352, 356 (1927); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

100. 444 U.S. 286 (1980).

101. 480 U.S. 102 (1987). The opinions in *Asahi* give other bases for the decision besides the minimum contacts argument. These other bases, however, derive their greatest support from Justices Brennan and Marshall, both of whom have since retired. *See generally* Howard B. Stravitz, *Sayonara to Minimum Contracts: Asahi Metal Indus. v. Superior Court*, 39 S.C. L. Rev. 729 (1988) (giving an in-depth analysis of *Asahi* and cases preceding it).

102. 12 U.C.C. Rep. Serv. 2d (Callaghan) 343 (3d Cir. 1990). Portions of the discussion of this case were prepared by Gregory Gelfand.

103. The *Step-Saver* opinion identifies this case as *Green Zinner, P.C. v. Step-Saver Data Systems, Inc.*, filed in the United States District Court for the Southern District of New York. *Id.* at 345. This ruling apparently was not appealed, and by operation of collateral estoppel it resolves the question for all of the other New York cases then pending.



Step-Saver then filed an action in Pennsylvania seeking a declaratory judgment of indemnity through vouching in. This procedural context did not require a reconsideration of the New York ruling on personal jurisdiction. Personal jurisdiction over the suppliers in Pennsylvania (for the declaratory judgment action) was clear because they sold directly to Step-Saver in Pennsylvania. The Third Circuit affirmed the trial court's holding that the declaratory judgment was unripe because it would not conclusively resolve any questions.<sup>104</sup> Until the twelve underlying cases were resolved, it would not be known if Step-Saver was liable at all, nor if that liability grew out of aspects of the transactions for which the suppliers might be liable.<sup>105</sup> This conclusion is based on a plain confusion of substance with procedure.

The Third Circuit seems to believe that vendors are given power under the Code to bind their suppliers without ever going to court:

In this case, Step-Saver will take the same steps whether [declaratory relief is given] or not. . . . Step-Saver has already vouched in the defendants under U.C.C. § 2-607(5)(a). Because defendants chose not to defend the customer suits on their own, they will be held liable as long as the defect proven in the customer suits is attributable to them. See generally, A. Squillante & J. Fonesca, 3 Williston on Sales 291-92 (4th ed. 1974) ("The seller-warrantor cannot object to liability on the ground that no jurisdiction attached to him over the litigation involved because the vouching in letter merely asserts that he has liability over to the warrantee. Jurisdiction is not a prerequisite for the effective application of the vouching in letter."); Restatement (Second) of Judgments section 57 comment C, illustration 4 (1982) ("[A] refusal to submit to jurisdiction . . . may be a proper basis for estopping the indemnitor from contesting determinations in the principal action."). Thus the declaration will not be of significant "practical help in ending the controversy" (citation omitted) because the declaration would merely do what established products liability law and U.C.C. section 2-607(5) already do, i.e. make the manufacturer ultimately liable for *defective* products.<sup>106</sup>

The assertion that, through vouching in,<sup>107</sup> a judgment of a New York court can bind the suppliers even though they have a due process right not to have their rights adjudicated in New York seems dubious at best. However, on the

104. *Step-Saver*, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 352.

105. In the Pennsylvania action, Step-Saver also sought to recover consequential damages for the costs incurred in attempting to maintain customer goodwill. Curiously, the Third Circuit held that this portion of the suit could go forward despite the court's professed refusal to decide whether the suppliers' goods are the cause of the customers' complaints. *Id.* at 375.

106. *Id.* (citation omitted). This statement, arguably a ruling on the merits of Step-Saver's claim (declaring the suppliers to be vouched in) is simply a secondary reason for the court's ultimate holding, and therefore is not binding on the parties. It will have to be relitigated after the underlying cases are resolved.

107. The vouching in is not a contractual term, but rather is a provision of state law most like a long arm statute. There is no doubt that the parties could contractually waive jurisdictional

basis of the authorities cited by the Third Circuit, it may be argued that vouching in is not an assertion of jurisdiction. The question is an open one and its answer is at least as uncertain now as it ever was.

Finally, one case demonstrates what is probably a sensible relaxation of the notification requirement of section 2-607(3)(a). In *Cooley v. Big Horn Harvestore Systems, Inc.*,<sup>108</sup> the Colorado Supreme Court held that a buyer (consumer or commercial) is only required to give notice to its immediate seller.<sup>109</sup>

## REJECTION AND REVOCATION OF ACCEPTANCE

Comment 1 to section 2-608 on revocation of acceptance provides: "The section no longer speaks of 'rescission,' a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract." Does this mean that the common law remedy of rescission can safely be ignored? The practical lesson from *H.B. Fuller Co. v. Kinetic Systems, Inc.*,<sup>110</sup> is that a buyer who does so runs the risk of losing its only remedy.

*Fuller* involved the purchase of a "palletizer", which is a large piece of machinery that stacks cartons or bags on pallets. Unfortunately, the palletizer never performed up to expectations because the buyer did not know that it also needed to purchase a "bag flattener" to precondition the filled bags. In its complaint the buyer sought rescission of the contract. At trial, however, both parties proceeded on the assumption that the buyer was seeking to revoke its acceptance under section 2-608. This proved to be the buyer's undoing. The district court granted a directed verdict to the seller on the ground that the palletizer conformed to the contract.<sup>111</sup> The Seventh Circuit affirmed. After noting that a distinction continues to exist under the Code between revocation and rescission,<sup>112</sup> the court went on to point out that the buyer might have been

objections without invoking due process concerns, but the assertion of vouching is exclusively an assertion of state authority.

108. 813 P.2d 736, 14 U.C.C. Rep. Serv. 2d (Callaghan) 977 (Colo. 1991).

109. The court reasoned that the term "seller" as used in § 2-607(3)(a) was intended to refer only to the seller with whom buyer was in privity. *Cooley*, 813 P.2d at 741, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 982.

110. 932 F.2d 681, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1080 (7th Cir. 1991).

111. Revocation of acceptance under § 2-608 is predicated on a showing that the goods failed to conform to the contract. See U.C.C. § 2-608(1). The fact that the palletizer did not perform to the buyer's satisfaction did not mean that it did not perform in accordance with the terms of the parties' agreement. Where, as here, the seller effectively disclaimed the implied warranties of merchantability and fitness, there was no breach of contract.

112. U.C.C. § 2-711(1) permits cancellation of the contract following rejection or revocation. The court was of the opinion that while this package of remedies (rejection or revocation and cancellation) supplants the contract action for rescission it leaves unaffected the common law action where there has been fraud or misrepresentation. *Fuller*, 932 F.2d at 685-86, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1085-86. The court was apparently correct. See U.C.C. § 2-721 which states:

[r]emedies for material misrepresentation or fraud include all remedies available under this Article for non-fraudulent breach. Neither rescission, or a claim for rescission of the contract

successful had it paid attention to the wording of its complaint and insisted that its claim was for rescission on the basis of the seller's fraud.<sup>113</sup> Then, the conformity of the palletizer would not have been decisive. This "legal nuance," as the court called it, is one that should not be overlooked in future cases.<sup>114</sup>

*In re Stem*<sup>115</sup> considered the perennial question of whether the buyer's right of revocation is defeated by the continued use of the goods.<sup>116</sup> The case involved a used car, which was driven for seven months and nearly 9,000 miles after the buyer's attempted revocation of acceptance and before suit. The court, citing *Stroh v. American Recreation & Mobile Home Corp.*,<sup>117</sup> held that the use of the car after revocation was wrongful,<sup>118</sup> consequently, the buyer was liable for the value of that use.<sup>119</sup> The prior revocation, however, remained effective.<sup>120</sup> Although the court emphasized the practical considerations facing buyers of automobiles,<sup>121</sup> it failed to indicate the degree to which those considerations were determinative of the outcome. Therefore, we are left to wonder whether a different good (less important) or a different type of buyer (merchant) will produce a different result.

Although the right to cure under section 2-508 is limited to rejections, some courts have been persuaded to extend that right to revocations under section

for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

113. *Fuller*, 932 F.2d at 686 n.2, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1086 n.2. The court saw as possibly fraudulent the seller's pre-delivery reassurances that the palletizer could be made to work properly and its failure to ever mention the need for a flattener. However, Fuller never made this argument.

114. *Id.* at 686, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1086.

115. 571 So. 2d 1112, 13 U.C.C. Rep. Serv. 2d (Callaghan) 1070 (Ala. 1990).

116. See David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 46 Bus. Law. 1455, 1488 (1991) (discussing *Triad Sys. Corp. v. Alsip*, 880 F.2d 247, 9 U.C.C. Rep. Serv. 2d (Callaghan) 567 (10th Cir. 1989) and *Steers Sec., Inc. v. Sportscoach Corp. of Am.*, 781 P.2d 1267, 10 U.C.C. Rep. Serv. 2d (Callaghan) 788 (Or. Ct. App. 1989)).

117. 530 P.2d 989, 16 U.C.C. Rep. Serv. (Callaghan) 726 (Colo. Ct. App. 1975).

118. *In re Stem*, 571 So. 2d at 1115-16, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 1074-76. U.C.C. § 2-602(2) provides that "after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller."

119. Not all courts agree that the seller is entitled to compensation for the buyer's use of the goods prior to their return. See, e.g., *Barco Auto Leasing Corp. v. House*, 520 A.2d 162, 169, 3 U.C.C. Rep. Serv. 2d (Callaghan) 122, 131-32 (Conn. 1987) (concluding that equities weighed in favor of denying setoff).

120. Buyers should be cautioned, however, that post-revocation use of the good may be evidence that the nonconformity did not substantially impair its value.

121. There is reason to suppose that the court was particularly sympathetic to the plight of this buyer, who we are told, needed the car for the transportation of his child. *In re Stem*, 571 So. 2d at 1116.

2-608.<sup>122</sup> Thus in *Tucker v. Agua Yacht Harbor Corp.*,<sup>123</sup> the district court granted summary judgment to the seller because it was not given a reasonable opportunity to effect cure.<sup>124</sup> An interesting issue which the court did not discuss was whether this judicially created right of cure should be bounded by the same statutory limitations that are found in section 2-508.<sup>125</sup>

## IMPRACTICABILITY

In *PPG Industries, Inc. v. Shell Oil*,<sup>126</sup> the Fifth Circuit, applying Texas law, considered the extent to which a seller can expand the protection given it by U.C.C. Section 2-615. In that case the parties signed a long-term contract for the production and sale of ethylene. The contract contained a clause excusing either seller or buyer if its performance were "delayed or prevented by any circumstances (except financial) reasonably beyond its control or by fire, explosion."<sup>127</sup> Five years later, after an explosion at the seller's refinery reduced its output of ethylene, seller reduced the quantities being delivered under the contract. The buyer sued the seller for breach, and the district court granted seller's motion for summary judgment, holding that the excuse clause covered all explosions, not just those beyond the seller's reasonable control. The Fifth Circuit affirmed, holding that section 2-615 did not invalidate the excuse clause.<sup>128</sup> The court declined to hold that section 2-615 required the excusing event to be either unforeseeable or beyond the seller's reasonable control. Instead, it applied the test of Comment 8, "mercantile sense and reason," and found that test satisfied where, as here, two sophisticated corporations had agreed to the clause. It also held that the clause was not manifestly unreasonable under U.C.C. Section 1-102(3).

The court's conclusion that section 2-615 does not require the excusing event to be beyond the seller's reasonable control is debatable. A prior draft of the section explicitly included that requirement.<sup>129</sup> Despite the section's deletion,

122. See generally Thomas K. Brown, *Revocation of Acceptance: The Right to Cure After Gappelberg v. Landrum*, 38 Baylor L. Rev. 441, 453-55 (1986) (discussing the limited application of the right to cure revocations made under § 2-608).

123. 749 F. Supp. 142, 13 U.C.C. Rep. Serv. 2d (Callaghan) 382 (N.D. Miss. 1990) (applying Mississippi law).

124. The controlling Mississippi decision is *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324, 6 U.C.C. Rep. Serv. 2d (Callaghan) 396 (Miss. 1988).

125. U.C.C. § 2-508 limits cure to situations where "the time for performance has not yet expired", U.C.C. § 2-508(1), or "the seller had reasonable grounds to believe [the tender] would be acceptable with or without money allowance." U.C.C. § 2-508(2).

126. 919 F.2d 17, 13 U.C.C. Rep. Serv. 2d (Callaghan) 390 (5th Cir. 1990).

127. *PPG Indus., Inc. v. Shell Oil Co.*, 727 F. Supp. 285, 287 (E.D.La. 1989), *aff'd*, 919 F.2d 17 (5th Cir. 1990).

128. *PPG Industries*, 919 F.2d at 18, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 390.

129. See John D. Wladis, *Impracticability As Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, 22 Ga. L. Rev. 503, 563 (1988).

the requirement apparently survived,<sup>130</sup> probably as part of the seller's general obligation of good faith performance.<sup>131</sup> The court may have declined to hold that section 2-615 includes the reasonable control requirement in order to avoid language in the section that seems to restrict the ability of the seller to contract for more protection than the section gives it.<sup>132</sup> The reason for this language remains largely obscure.<sup>133</sup> Consequently, the P.E.B. Article 2 Study Group has recommended that the language be amended to remove any restriction on the seller's right to contract for increased protection.<sup>134</sup>

## **BUYER'S MONEY REMEDIES AND THEIR LIMITATIONS**

The Supreme Court of Pennsylvania recently had an opportunity to further clarify the buyer's lost-profits remedy under sections 2-714 and 2-715. In *AM/PM Franchise Association v. Atlantic Richfield Co.*,<sup>135</sup> franchisees that operated AM/PM Mini Markets in Pennsylvania and New Jersey brought a breach of warranty suit. The complaint alleged that from early 1982 through September 30, 1985, Atlantic Richfield Co. (ARCO) sold its franchisees a type of experimental unleaded gasoline (blended with oxinol) which resulted in poor engine performance and physical damage to fuel system components. The franchisees claimed that this breach of warranty by ARCO caused them to lose business and profits.

The Pennsylvania high court held that the franchisees were entitled to try to prove their damages.<sup>136</sup> In the course of its opinion, the court presented an original tripartite categorization of the types of lost profits recoverable as consequential damages. The first type was primary profits consisting of the lost gasoline sales during the period that ARCO delivered the nonconforming gasoline. Next was lost secondary profits attributable to the decrease in sales of other items sold at the mini-marts. Finally, there were goodwill damages or prospective damages, as they are sometimes called. Although not actually

130. *Id.*; see also Comment on Criticisms of Article 2 Uniform Commercial Code 110 (Oct. 31, 1955) in the Braucher Papers, *supra* note 27, File 26-2 (N.Y. Law Revision Commission recommendation to limit excuse for impracticability by adding words "without his fault" is rejected for the reason that "[l]imitation to impracticability arising 'without the seller's fault' is implicit in the Code text.").

131. *Cf.* U.C.C. § 2-615, cmt. 5 and Cross Reference: Point 5: Section 1-203; *id.* § 1-203 and cmt. 1 (describing § 2-615 as particular application of general obligation of good faith). Good faith under Article 2 for a merchant seller, includes "observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b).

132. U.C.C. § 2-615 begins: "[e]xcept so far as a seller may have assumed a greater obligation."

133. See A.B.A. Task Force, "An Appraisal of the March 1, 1990, Preliminary Report of the U.C.C. Article 2 Study Group," 16 Del. J. Corp. L. 981, 1200-01 (1991) [hereinafter A.B.A. Task Force Appraisal].

134. Preliminary Report, Article 2 Study Group: March 1, 1990, Rec. A 2.6(10)(B), *reprinted* in A.B.A. Task Force Appraisal, *supra* note 133, at 1196.

135. 584 A.2d 915, 14 U.C.C. Rep. Serv. 2d (Callaghan) 11 (Pa. 1990).

136. *Atlantic Richfield Co.*, 584 A.2d at 918, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 12.

claimed by the franchisees, these would refer to the losses which continued to accrue even after the problem with the gasoline had been solved. In a sharp break from precedent,<sup>137</sup> the court concluded that all three types of lost profits could be recovered upon proper proof.<sup>138</sup>

*AM/PM* is an important decision. There is no reason, other than the elevation of form over substance, why any particular type of loss should be considered too speculative as a matter of law to allow recovery. The court noted that modern advances in market analysis and economics have made it possible to prove with sufficient certainty losses which were formerly incapable of proof. In sum, *AM/PM* represents a significant step towards a general rule of damages which would merely distinguish between general damages and all other damages.

While section 2-715 specifically provides for an award of damages for injury to the person,<sup>139</sup> it leaves open the question of whether damages for mental anguish are recoverable in a breach of warranty action.<sup>140</sup> This issue arose in *Volkswagen of America, Inc. v. Dillard*,<sup>141</sup> which involved the purchase of a new automobile. The undisputed evidence showed that the plaintiff had acquired an automobile that was neither reliable nor safe. In fact, it was such a "lemon" that he turned it in for repair twenty-one times during the first year and a half. The Alabama Supreme Court affirmed a jury award of \$8,000 for mental anguish. It concluded that the words "injury to the person" in Alabama's nonuniform version of section 2-714(2) evinced the legislative intent to include these damages, without regard to whether they are accompanied by physical injury.<sup>142</sup>

Other cases deserving note are *Fortin v. Ox-Bow Marina Inc.*,<sup>143</sup> in which the Supreme Court of Massachusetts held that a buyer who properly revoked acceptance was entitled to recover as consequential and incidental damages, respectively, interest on a purchase-money loan and the sales tax; *Cooley v. Big Horn Harvestore Systems, Inc.*,<sup>144</sup> in which the Colorado Supreme Court determined that the failure of a limited remedy of repair or replacement to

137. Historically, damages for loss of goodwill in breach of warranty cases were not permitted in Pennsylvania. See *Kassab v. Central Soya*, 246 A.2d 848, 5 U.C.C. Rep. Serv. (Callaghan) 925 (Pa. 1968).

138. *Atlantic Richfield Co.*, 584 A.2d at 926, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 25. The recoverability of each item of damages would depend upon a showing that the damages were reasonably foreseeable at the time the agreement was entered into, see U.C.C. § 2-715(2)(a), and the defendant's breach was the proximate cause of the harm suffered.

139. Section 2-715 reads in pertinent part: "Consequential damages resulting from the seller's breach include: . . . [i]njury to person or property proximately resulting from any breach of warranty." U.C.C. § 2-715(2)(b).

140. Compare *Bogner v. General Motors Corp.*, 459 N.Y.S.2d 679, 35 U.C.C. Rep. Serv. (Callaghan) 466 (N.Y. Civ. Ct. 1982) (damages for emotional distress were allowed), with *Wise v. General Motors Corp.*, 588 F. Supp. 1207 (W.D. Va. 1984) (damages for emotional distress were disallowed).

141. 579 So. 2d 1301, 14 U.C.C. Rep. Serv. 2d (Callaghan) 475 (Ala. 1991).

142. *Dillard*, 579 So. 2d at 1306-07, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 482-84.

143. 557 N.E.2d 1157, 12 U.C.C. Rep. Serv. 2d (Callaghan) 691 (Mass. 1990).

144. 14 U.C.C. Rep. Serv. 2d (Callaghan) 977 (Colo. 1991).

achieve its essential purpose negated a contractual limitation on the availability of consequential damages; and *American Nursery Products, Inc. v. Indian Wells Orchards*,<sup>145</sup> in which the Washington Supreme Court held that where there is no indicia of unfair surprise, the conscionability of a clause excluding consequential damages in a contract between merchants should be judged by a less stringent standard than that which is applied in the consumer sales context.

## SELLER'S MONEY REMEDIES

U.C.C. Section 2-718(1) provides, in part, "A term fixing unreasonably large liquidated damages is void as a penalty." *Kyassay v. Murray*<sup>146</sup> raised the problem of reasonableness in the context of a newly established business. In this case, the contract was for the purchase and sale of 24,000 cases of baklava at \$19.00 per case. A liquidated damages clause set the seller's damages at \$5.00 (the expected profit) for each case not accepted by the buyer.

The court properly concluded that this was an appropriate case for the recovery of lost profits pursuant to U.C.C. Section 2-708(2), notwithstanding that the seller had only recently gone into the bakery business.<sup>147</sup> The only disadvantage a new seller faces is the practical one of not being able to rely on a history of earnings to prove future losses with reasonable certainty.<sup>148</sup>

On the issue of whether the contract measure of \$5.00 expected profit per case was reasonable, the opinion is troubling. Having properly rejected the relevancy of the seller's past earnings as an insurance adjuster, the court held that the proper measure by which to judge the clause's reasonableness was the seller's actual loss. The difficulty with such an approach is that it negates many of the efficiencies that a liquidated damages provision was designed to promote. It would make more sense to invoke a far less restrictive view of reasonableness and allow for the enforcement of these clauses if bargained-for and not otherwise unconscionable.<sup>149</sup>

145. 797 P.2d 477, 12 U.C.C. Rep. Serv. 2d (Callaghan) 928 (Wash. 1990).

146. 808 P.2d 896, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1093 (Kan. Ct. App. 1991).

147. *Kvassey*, P.2d at 903, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1100-01. U.C.C. § 2-708(2), which allows recovery for loss of profits, is particularly well suited to those cases where the seller does not have the goods on hand. The assumptions underlying subsection (1) are that a market for the goods exists and the seller will be able to recover all, or at least a part, of its anticipated profit from a substituted sale. Where the seller has no goods to sell, the buyer is the seller's only source of recovery.

In deciding that a new business may recover future profits, the court relied, in part, on official comment 2 to U.C.C. § 2-708, which states: "It is not necessary to a recovery of 'profit' to show a history of earnings, especially if a new venture is involved." For a case in which this same comment was used to justify an award of profits to a newly formed buyer, see *In re Merritt Logan, Inc.*, 901 F.2d 349, 12 U.C.C. Rep. Serv. 2d (Callaghan) 421 (3d Cir. 1990).

148. The court was careful to stress that to require a more exacting standard of proof from new businesses would be to place them at a substantial disadvantage. 808 P.2d at 903, 14 U.C.C. Rep. Serv. 2d (Callaghan) at 1100-01.

149. Whether such an approach would be in accord with the statute as it is presently written is debatable. U.C.C. § 2-718(1) provides: "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual

One area in which the U.C.C. offers little guidance is in allocating the burdens of proof in particular situations.<sup>150</sup> For example, suppose that following the buyer's repudiation, the seller decides not to obtain the goods called for by the contract. This is permissible under section 2-704(2), provided that the decision to cease performance is reasonable. In *Young v. Frank's Nursery & Crafts, Inc.*,<sup>151</sup> the Ohio Supreme Court held that the buyer had the burden of proving that the seller's decision not to cut evergreen boughs following the buyer's repudiation was unreasonable. At stake here was the seller's right to recover his lost profit under section 2-708(2). A finding that his conduct was unreasonable would relegate him to the less generous contract-market formula of section 2-708(1).<sup>152</sup>

No provision for consequential damages is included in the seller's remedies under Article 2. Thus, the characterization of seller's damages as incidental or consequential may be critical. Often, however, the line between these two forms of damages cannot be easily drawn. In *Jelen & Son, Inc. v. Bandimere*,<sup>153</sup> the seller contracted to sell barrels of hazardous chemicals. Although it was unclear which party was initially responsible for transporting the barrels to the buyer's premises, the seller eventually agreed to make delivery. On the way to the buyer's place of business he got lost and turned his trucks around in the parking lot of the local fire department. As fate would have it, the fire marshal happened to be looking out of his window at the time and noticed the trucks with liquid splashing out of the barrels. The seller was charged with criminal violations for transporting hazardous materials. The charges were dropped after he agreed to pay all costs associated with the clean-up costs plus the legal fees he incurred in defending the criminal action.

On appeal, the Colorado Supreme Court held that the seller's damages were consequential and hence, not recoverable.<sup>154</sup> It is possible that the court was

harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."

150. See generally Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems In—and Solutions For—The Uniform Commercial Code*, 1984 Duke L.J. 92.

151. 569 N.E.2d 1034, 14 U.C.C. Rep. Serv. 2d (Callaghan) 463 (Ohio 1991).

152. If the decision not to cut were determined to be unreasonable, the effect would be to treat the seller the same as if he had cut. As a seller who hypothetically has the goods, the marketplace would be available to him as a source of recoupment. Therefore, the buyer's liability would be limited to the difference between the contract price and the market price under U.C.C. § 2-718(1). See *infra* note 162.

153. 13 U.C.C. Rep. Serv. 2d (Callaghan) 344 (Colo. 1990).

154. *Bandimere*, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 352-53. The court's disposition of the damages issue excused it from having to decide whether the buyer had actually breached the contract. Two reasons are offered to explain why the buyer's rejection may not have been wrongful. Easy to understand is the view that there was no duty to accept because the seller's tender was unreasonable (the materials were loaded in open, corroded and leaking barrels). More difficult to comprehend is the court's suggestion that if the seller was not contractually obligated to make delivery, then there were no remaining duties under the contract which could be breached by either party. That is, the contract had been fully performed and the seller was holding the materials as the buyer's agent. But if that were true, would not the buyer be under a non-Code duty to indemnify the



wrong. Were not these damages causally connected to the buyer's rejection and incurred in relation to the goods?<sup>155</sup> Is it not contrary to the remedial policy expressed in section 1-106 to deny the seller, *in all cases*, the recovery of consequentials?<sup>156</sup> Perhaps the time has come to discard artificial labels in favor of a rule which would allow either party to recover "uncommon" damages subject only to the "reason to know" requirement found in section 2-715(2)(a).

## STATUTES OF LIMITATION

As in prior years, most of the statute of limitations cases involved attempts to escape the basic rule of section 2-725 that a cause of action accrues and the limitations period begins to run "when tender of delivery is made."<sup>157</sup> In *Luddeke v. Amana Refrigeration, Inc.*,<sup>158</sup> the buyers brought suit against the seller and the manufacturer of a home heating, air conditioning, and hot water system approximately five years after the system was installed.

On appeal, the Supreme Court of Virginia was not persuaded by the buyers' contention that the manufacturer's limited warranty providing "a free replacement part . . . for any part found defective"<sup>159</sup> tolled the statute during the period that repairs were attempted. Although the court was willing to assume without deciding that this warranty was a "future performance" warranty under section 2-725(2),<sup>160</sup> it nevertheless concluded that the buyers' claim was time-barred because the relief requested in the complaint did not seem to be predicated on a breach of this particular warranty or promise.<sup>161</sup>

seller for all liabilities incurred, notwithstanding their nature? See Warren A. Seavey, Agency, § 168 (1964).

155. See U.C.C. § 2-710 ("Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.").

156. U.C.C. § 1-106 provides: "The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, *but neither consequential or special nor penal damages may be had except as specifically provided in this title or by any other rule of law.*" (emphasis added) Ironically, the court relied on the italicized language of U.C.C. § 1-106 to support its conclusion that a seller may not recover consequentials. 13 U.C.C. Rep. Serv. 2d (Callaghan) at 351.

157. U.C.C. § 2-725(2) (1991).

158. 387 S.E.2d 502, 12 U.C.C. Rep. Serv. 2d (Callaghan) 123 (Va. 1990).

159. *Luddeke*, 387 S.E.2d at 504, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 125. This so-called "limited warranty" also included a disclaimer of responsibility for any incidental or consequential damages.

160. The statute of limitations begins to run for most breach of warranty claims when tender of delivery is made; however, if the warranty "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance," the statute of limitations begins to run only "when the breach is or should have been discovered." U.C.C. § 2-725(2) (1991). To be precise, the court's assumption was that the warranty was implicitly a warranty of future performance. 387 S.E.2d at 504, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 125. But if it is implicit, the warranty does not *explicitly* extend to the future performance of the good, does it?

161. The quoted portion of the complaint alleged that "the Defendants failed and refused . . . to replace said system with one that works", *id.* at 504, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 126,

In all respects the court's opinion is troubling. First, the court should not have so readily assumed that a promise to replace is a warranty.<sup>162</sup> We argued in a previous survey that if a promise of this sort is any *one* thing, it is a limited remedy, not a warranty.<sup>163</sup> Second, if the system did not perform properly after the defective parts were replaced, it could be argued that the remedy had failed its essential purpose; therefore, the buyers had available to them the full panoply of Code remedies, including revocation of acceptance.<sup>164</sup> Finally, one should question the wisdom of deciding cases based on a strict construction of the pleadings. We can only guess whether the case might have been decided differently had the court focused more on the substance of the buyers' claim than on the form in which it was presented.

As an alternative to a future performance warranty, buyers often seek to extend the limitations period by arguing that section 2-725 is inapplicable to their claim. A recurring issue which arose again this year is whether this section governs an action for indemnity. In *Sheehan v. Morris Irrigation, Inc.*,<sup>165</sup> the answer was yes, only because the court believed that no inequity would result from its application. Here, the plaintiff discovered the breach of warranty and could have brought suit within four years of the sale.<sup>166</sup> Unfortunately, this case-by-case approach is likely to spawn more litigation than it resolves. *Davidson Lumber Sales, Inc. v. Bonneville Investment, Inc.*,<sup>167</sup> added to the confusion. In this case, the Utah Supreme Court took the position that section 2-725 applies only to indemnification claims that grow out of U.C.C. contract and

and the remedies demanded were replacement of the entire system and consequential damages. *Id.*, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 126. Moreover, the buyers maintained that the "repair and replacement *promises* are not *warranties*" (emphasis in original) and that the cause of action for breach of these promises occurred when the attempted repairs failed. The court shot down this argument on the grounds that no promise to repair was ever made and the complaint did not allege a breach of the promise to replace. *Id.*, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 126.

162. The majority view is clearly otherwise. See, e.g., *Ontario Hydro v. Zallea Sys.*, 569 F. Supp. 1261, 36 U.C.C. Rep. Serv. (Callaghan) 1222 (D. Del. 1983); *Tittle v. Steel City Oldsmobile GMC Truck, Inc.*, 544 So.2d 883, 8 U.C.C. Rep. Serv. 2d (Callaghan) 701 (Ala. 1989); *Voth v. Chrysler Motor Corp.*, 545 P.2d 371, 18 U.C.C. Rep. Serv. (Callaghan) 954 (Kan. 1976). But see *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 25 U.C.C. Rep. Serv. (Callaghan) 65 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) (repair or replace warranty for specific period of time explicitly warrants future performance).

163. See David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 45 Bus. Law. 2289, 2325 (1990). This is not meant to suggest that the promise cannot also constitute a warranty. It may be that it is an indirect way of saying that the goods will continue to perform in the future, i.e., a warranty of future performance. *Id.*

164. See U.C.C. § 2-719(2) (1991). That would mean that the unartfully worded demand for revocation was not at odds with the idea that the underlying breach was of the duty to replace.

165. 460 N.W.2d 413, 13 U.C.C. Rep. Serv. 2d (Callaghan) 145 (N.D. 1990).

166. The court reasoned that the right of indemnification is rooted in equity and should be available only when the party seeking it is free of wrongdoing. *Id.* at 417, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 150. The transgression in this case was the failure to proceed diligently and promptly once the claim was discovered. Judge Sabers argued in dissent that the only relevant fault is fault in causing the product not to perform as warranted. *Id.* at 419, 13 U.C.C. Rep. Serv. 2d (Callaghan) at 415.

167. 794 P.2d 11, 13 U.C.C. Rep. Serv. 2d (Callaghan) 415 (Utah 1990).

U.C.C. warranty actions (except a warranty action under section 2-318).<sup>168</sup> Therefore, it did not govern where the underlying action was brought by a party who was never a purchaser of the goods and who sought to recover for injury to personal property.<sup>169</sup>

Once again, a disappointed buyer of counterfeit artwork was confronted with a statute of limitations defense; this year, however, the outcome was different.<sup>170</sup> In *Balog v. Center Art Gallery-Hawaii, Inc.*,<sup>171</sup> the buyers were given a certificate of authenticity with each purchase and received at various times thereafter a "Confidential Appraisal-Certificate of Authenticity."<sup>172</sup> The district court, in an exceptionally well-articulated and detailed opinion, concluded that: (i) the certificate of authenticity created an explicit warranty of future performance under section 2-725(2);<sup>173</sup> (ii) each time a certificate of authenticity was mailed to the buyers, a new warranty was given and a new claim for breach accrued;<sup>174</sup> and (iii) the repeated mailings to the buyers of certificates of authenticity constituted fraudulent concealment of their claims and tolled the statute of limitations.<sup>175</sup>

168. *Davidson Lumber Sales, Inc.*, 794 P.2d at 18, 13 U.C.C. Rep. Serv. 2d (Callaghan) 426-27. The type of damages sought will determine the true nature of the action. Accordingly, U.C.C. § 2-725 will govern in actions for economic or breach of contract damages, and in those actions where personal property damages are claimed as consequential for breach of contract.

169. The indemnification claim was against the manufacturer of a wood beam and resulted from the plaintiff's payment to the lessee of a building whose roof collapsed because the beam was defective.

170. For discussions of past cases, see David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 43 Bus. Law. 1259, 1302 (1988) (discussing *Firestone & Parson, Inc. v. Union League*, 672 F. Supp. 819, 3 U.C.C. Rep. Serv. 2d (Callaghan) 449 (E.D. Pa. 1987)); David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 44 Bus. Law. 1445, 1491-92 (1989) (discussing *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3, 6 U.C.C. Rep. Serv. 2d (Callaghan) 321 (1st Cir. 1988)); David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 46 Bus. Law. 1455, 1500-01 (1991) (discussing *Rosen v. Spanierman*, 894 F.2d 28, 10 U.C.C. Rep. Serv. 2d (Callaghan) 846 (2d Cir. 1990)).

171. 745 F. Supp. 1556, 12 U.C.C. Rep. Serv. 2d (Callaghan) 962 (D. Haw. 1990).

172. Each certificate maintained that the pieces were Dali originals or limited editions, and represented that they had appreciated in value since they were first purchased. *Id.* at 1558, 12 U.C.C. Rep. Serv. 2d (Callaghan) 964-65.

173. However, this conclusion does not seem consistent with the substance of the express warranty which the court described in the following terms: "[F]airness dictates that representations offered by one party with the expectation that they be relied upon by another have some reasonable basis in fact. Such is the requirement of § 2-313." *Id.* at 1566, 12 U.C.C. Rep. Serv. 2d (Callaghan) at 976. It would seem that this warranty is breached, if at all, at the time the representations were made; if there exists an element of futurity it is not readily apparent.

174. But if the buyers had already purchased the items, how were the later representations able to become "part of the basis of the bargain"? See U.C.C. § 2-313(1)(a) (1991).

175. The law of tolling, including the doctrine of fraudulent concealment, is explicitly saved by U.C.C. § 2-725(4) ("[T]his section does not alter the law on tolling of the statute of limitations . . .").

Sellers occasionally have problems with section 2-725. A representative case is *Schelske v. South Dakota Poultry Cooperative, Inc.*,<sup>176</sup> in which the South Dakota Supreme Court held that a cause of action for nonpayment accrues when payment first becomes due under the contract. This may or may not be when the goods are first tendered to the buyer.

176. 465 N.W.2d 187, 14 U.C.C. Rep. Serv. 2d (Callaghan) 782 (S.D. 1991).

